No. 12,373

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN STOPPELLI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF.

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THE KEY TO THE ERROR IN THE PROSECUTION'S REPLY BRIEF IS THE ERRONEOUS BELIEF THAT THERE IS NO PRESUMPTION OF INNOCENCE IN NARCOTIC CASES BUT ONLY A PRESUMPTION OF GUILT.

The prosecution's reasoning is founded upon a fundamental error when it says at page 32 of its brief:

> "The Congress, acting for the people, *by inserting in the law the presumption of guilt arising out of unlawful possession of narcotics* * * *"

The provisions of the law do no more than create a *prima facie* case when there is legal and actual proof of possession of narcotics and make it proof of unlawful possession. There is nothing in these laws which destroys the presumption of innocence.

This *prima facie* evidence rule does not mean that every possible thing or fact connected with a narcotic case is to be interpreted only as consistent with guilt. If there are facts which can reasonably be interpreted in favor of innocence, such interpretation must be given.

Example: The prosecution's reasoning is that because eleven other envelopes are of the same type it must be presumed that Stoppelli handled the other eleven also. There is no evidence that the envelopes were of a peculiar kind or type. It is apparent from looking at the envelopes that they are of a kind that can be bought in San Diego, California, New York City, Tampa, Florida or Seattle, Washington and in numerous stores in each location. That fact is therefore just as logically consistent with Stoppelli's innocence of handling the eleven other envelopes, as with guilt. The court must reach those conclusions of fact which are logically consistent with innocence.

The prosecution in every instance reasons that all facts are to be interpreted only as proving guilt.

Another example of the prosecution's reasoning is its insistence that if an envelope with Stoppelli's fingerprint is found in Oakland, the court must find that Stoppelli was in Oakland. The presumption of innocence compels the conclusion that he was not in Oakland until evidence to the contrary appears. The prosecution insists, however, that this court must presume guilt and reach the conclusion that he was in Oakland from the fact the envelope was found there, in possession of others, unknown to him.

Regardless of the effect of the *prima facie* rule, it has its limitations. Though affirmed on the *facts,* Mr. Justice McReynolds, seeing the danger in the *prima facie* rule, said in *Casey v. U. S.,* 276 U.S. 413 (72 L. Ed. 632) at page 635:

> "I accept the views stated by Mr. Justice Butler * * *. But I go further.
>
> The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guarantees heretofore supposed to protect all against arbitrary conviction and punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.
>
> Once the thumbscrew, and the following confession, made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor.
>
> The victim will be spared the trouble of confessing, and will go to his cell without mutilation or disquieting outcry."

Question: How far can this rule be stretched without evidentiary support? Justice McReynolds saw very well that the *prima facie* rule was but one step in the effort by prosecutors, to do away with all the constitutional rights of a defendant.

In the prosecution's brief we see the ultimate and final step feared by Mr. Justice McReynolds, i.e., that there is a presumption of guilt and no presumption of innocence.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILT AGAINST THE DEFENDANT AND APPELLANT ON THE FIRST AND SECOND COUNTS OF THE INDICTMENT.

(a) The evidence, even as interpreted by the prosecution, is insufficient to support a violation of the Harrison Narcotic Act.

The charge against Stoppelli under the Harrison Narcotic Act is that he sold, dispensed and distributed *in Oakland, California* 12 envelopes of heroin. The envelopes were *found* in the possession of four men in Oakland; Stoppelli, as far as the record shows, was in New York.

The prosecution, after indulging in many conclusions of fact and inferences based upon a presumption of guilt, winds up with the final conclusion that Stoppelli *at one time had the narcotics in his possession.* It will be noticed that the *prima facie* evidence provision of the Harrison Narcotic Act is as follows:

> "The absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this sub-section *by the person in whose possession same may be found;* * * *"

The requirement of the Harrison Act is that the narcotics be found in the possession of the defendant. The contrary appears, i.e., the narcotics were in the possession of other parties who were not connected with Stoppelli. The Jones-Miller Act uses the words in regard to possession:

> "To have or to have had possession of a narcotic drug, * * *"

It is plain from the difference in the wording of these laws that the Harrison Act requires that the narcotics be found in the possession of the defendant, while under the Jones-Miller Act it can be shown that he had possession sometime in the past.

The prosecution produced positive evidence showing the narcotics were found in the possession of parties not connected with Stoppelli. They did not prove or even infer that they were discovered or found in his possession. On the prosecution's own statement there is no evidence showing that Stoppelli violated the Harrison Narcotic Act.

(b) The evidence was insufficient to show a violation of the Jones-Miller Act.

The prosecution (page 8 of its brief) insists that because all 12 envelopes contained 80% heroin and 20% reducing sugar this proves that Stoppelli possessed all 12 at some time and place, unspecified. There is no evidence that Stoppelli reduced the heroin. Likewise, it cannot be presumed that only Stoppelli and no other person in the whole world would mix heroin with reducing sugar or that he was the only person who mixed them in those proportions. No conclusion of Stoppelli's guilt can be reached from this fact. The evidence of the prosecution witness LaFevar (Tr. pp. 205-7) shows that defendant Ingoglia did reduce heroin with milk sugar, and that the witness purchased such milk sugar for Ingoglia.

The prosecution (Br. pp. 10, 15) argues that there was heroin in the one envelope when Stoppelli's fingerprint was made. It arrives at this by accepting, as

a proven fact, the conclusion of W. Harold Greene that there was a powdery substance in a container enclosed in the one envelope which showed Stoppelli's print. We answered this argument in our opening brief. (pp. 5-8.) We refer to it again to show the bias, prejudice and gross unfairness of W. Harold Greene. We also refer to it again to show Greene's calculated plan of misconduct when testifying.

The prosecution on page 8 of its brief argues that it is reasonable to assume that appellant dispensed or distributed the narcotics to "His (Stoppelli's) Agent". There is no evidence that Stoppelli ever knew or had contact with any of the other defendants. Why, we ask, is it not just as logical to reason that if Stoppelli sold or conveyed the narcotics, he did so to some person and with no knowledge of its future use or owners or destination, and that through devious handlings and sales, it reached the other co-defendants.

The conclusion of the witness Greene that there was heroin inside the containers in the envelopes rests only in the speculation and suspicion of the witness Greene. We again point out that many substances other than heroin could have brought about Greene's conclusion. The presumption of innocence is a guard-wall against such conclusions.

The reasoning of the prosecution is well illustrated by its attempt to distinguish between facts in the case of *Ching Wan v. U. S.*, 35 Fed. (2d) 665 and the facts of this case. In the *Ching Wan* case, the court expressly held that a person had to possess knowledge

of what was within a box before he could be held guilty of the possession of narcotics contained therein. But the prosecution contends here that in an envelope which is not transparent nor translucent and containing still another sealed cellophane envelope, Stoppelli must have known that there was heroin therein. The record here shows no more evidence of guilt nor knowledge of the contents of this envelope (if it were ever handled by Stoppelli) than was shown in the *Ching Wan* case.

The failure to prove Stoppelli's knowledge of the nature of the contents of the envelope is fatal.

The prosecution at pages 16 and 17 of its brief misstates the facts in *Camau v. U. S.,* 276 Fed. 120. The facts there were not, simply, that the defendant had keys to a trunk in which narcotics were hidden. The additional facts are that the defendant was the manager of a hotel, in the basement of which there were a number of trunks; the officers asked him whether he had the keys to any of the trunks and he denied that he had them; the officers searched him and he surrendered a bunch of keys. Three of the keys fitted three of the trunks in which narcotics were found. In the *Camau* case, the direct connection of the defendant with possession and control of the trunks and the keys was shown, together with his false answers as to his access to the trunks. A very different set of facts than that set forth by the prosecution.

On page 16 of their brief the prosecution argues that a period of four weeks is a "short time". W. Harold Greene testified that the fingerprint of Stop-

pelli was up to four weeks old. Notwithstanding this, the prosecution contends that the narcotics were delivered to the undercover operator by a co-defendant of Stoppelli within "a short time" after Stoppelli's finger print was placed on one of the envelopes. We find no evidence to connect Stoppelli with this delivery, and this fingerprint up to four weeks old is not sufficient.

Finally, the prosecution seeks to sustain the verdict by sustaining the presumption that there was heroin in the envelope as against the presumption (of innocence) that there was not. Then upon this presumption another must be added, to-wit: that Stoppelli knew it was heroin.

The prosecution asks why the defense didn't put a fingerprint expert on the stand. The Government didn't prove a case against Stoppelli and it wasn't the burden of Stoppelli to prove himself innocent. Under this state of the evidence in this case, I felt it was unnecessary to offer any testimony. The record will show I so stated to the court at the trial.

THE MISCONDUCT BY THE GOVERNMENT WITNESS W. HAROLD GREENE.

There is proof before this court that there was bias and prejudice in this case.

The jury in this case found Stoppelli guilty of conspiracy without sufficient evidence, in the opinion of the trial judge, and he granted a new trial. In fact,

there was not one iota of evidence to show a conspiracy or combination between Stoppelli and the other defendants. A clearer demonstration of the bias and the prejudice in the minds of this jury resulting from the misconduct of the prosecutor and Mr. Greene cannot be imagined. When a jury's verdict is against *a man upon no evidence, prejudice and bias are clearly shown.*

In approaching the misconduct of W. Harold Greene, we point out that in a narcotics case, it is impossible to obtain a completely unprejudiced jury. There has been so much said in magazines, the press, and on the radio over the years concerning the evils of narcotics that the very mention of the word creates revulsion and bias and prejudice in every person. In these circumstances a defendant has an up-hill battle every inch of the way and the least finger of suspicion pointed at the defendant is sufficient to produce a conviction.

It is daily experience in the courts that any statement or hint from a Government witness in a narcotics case is quickly seized upon by the average juror as a fact.

This Honorable Court should take judicial notice of the dangers to a defendant and to the improbability of securing a fair trial.

The prosecution argues that the jury here would not have caught the plain and direct meaning of what W. Harold Greene said. This is contrary to human experience. He used the clearest of language, which

coupled with his position was enough to prejudice any juror. No statement by a Government witness from which either suspicion or inference of Stoppelli's connection with the narcotics business could go unnoticed by a juror. To argue to the contrary is to be blind to the tendency of human nature.

Please notice in Mr. Greene's deliberate statements that he refers to:

"We have a National Book"

"Every District Supervisor in the County in the Narcotics Bureau has a National Book"

"Published by the Narcotics Bureau"
(Tr. p. 254.)

The jury would have to be completely simple and dumb not to have caught, immediately, the full import and meaning of these words.

We completely disagree (Res. Br. p. 19) that the trial judge drew no inference from these remarks. The very fact that the judge instructed the jury to disregard the answer is indicative that he, too, caught the clear meaning.

As to the remarks made by the trial judge (Tr. p. 303 and 305) and referred to by the prosecution on page 20 of its brief, we respectfully submit that the verdict shows that the reasoning of the lower court was unsound and hastily considered.

The prosecution (page 21) argues that when Mr. Greene used the phrase "men of experience of that type" these words meant nothing more than that Mr.

Stoppelli was skilled in the art of placing things in envelopes. This is a most ingenious explanation of Mr. Greene's misconduct. To presume that the jury placed the meaning upon the quoted words, as contended by the prosecution, would be to presume that the jurors were a naive and helpless group of no worldly experience and were playing a game.

The prosecutor too either fails or refuses to understand the damage done and the prejudice engendered by his statements. It was misconduct for the prosecutor particularly to say "if he handled the narcotics in one envelope, if he handled one ounce of narcotics, or a half ounce, or 5 grams, it is as though he handled, possessed, concealed, aided and abetted in the concealment and the sale of all of the narcotics in all of the envelopes". (Tr. p. 34.) In other words, the prosecutor said the defendant could be convicted of handling all of the narcotics involved in this case if he handled 5 grams. That was a gross misstatement of law which now the prosecutor wishes to avoid. We particularly charge that it was misconduct by the prosecuting attorney also to make the statements (Tr. pp. 30-31) and referred to on page 17 of our opening brief because there is no evidence that Stoppelli committed any crime in the State of New York; there is no evidence that he set any criminal forces loose with the intent the act be consummated in California; there is no evidence that Stoppelli sent narcotics to the State of California; there is no evidence that he possessed the narcotics. The harm was done by the prosecutor in using language so loose as to mislead the jury and create prejudice in their minds.

The jury was forced to start with a fixed prejudice against the entire case, each of the defendants, and particularly Stoppelli. Upon such foundation, error such as was committed by the prosecuting attorney and Mr. Greene, together with the thin, if any, evidence against Stoppelli brought about a conviction. Prejudice, in other words, created by connecting the defendant Stoppelli with narcotics and the prosecutor's misstatements of the facts of the case, as they related to the defendant Stoppelli, were sufficient to prevent a fair trial.

The prosecution argues that the holding of *U. S. v. Dressler,* 112 Fed. (2d) 972, is applicable only to a capital case. A reading of the entire decision shows it lays down a general rule applicable to all cases alike.

THERE WAS A TOTAL FAILURE TO PROVE VENUE IN THE NORTHERN DISTRICT OF CALIFORNIA.

All three counts of the indictment charged that the offense was committed in Oakland, California.

In this respect we have never contended that there had to be direct evidence of Stoppelli's presence in the State of California. While it is true that venue may be shown by circumstantial evidence, nevertheless here there is a total lack of evidence of anything being done by Stoppelli in California, or anywhere else. There is no evidence Stoppelli at any time in his whole life was in the State of California.

The prosecution contends that testimony that the envelope with Stoppelli's fingerprint was found in Cali-

fornia is sufficient to prove venue. The envelope could have passed through 50 hands, starting somewhere in Europe and ending in San Francisco. According to the Government's testimony, the fingerprint could have been as much as four weeks old. In four weeks these narcotics could have traveled twice around the world. There can be no logical inference that Stoppelli was in California.

In fact, the prosecution's brief at page 15, under another point, relates evidence from which the conclusion must be drawn that Stoppelli came from New York for this trial and secondly, to the fact

> "There is evidence that the narcotics which were delivered to the undercover operative in Oakland came from New York * * *"

In other words, taking the Government's evidence as true, it shows venue, as far as Stoppelli is concerned, in New York.

In the face of these facts, the prosecution argues that it is the law that venue is to be presumed in California (against the known facts) if the narcotics are found here. There is no decision of any court in the United States to the effect that narcotics being found in one state and the defendant located in another state that venue is fixed where the narcotics are found. All of the reported cases on venue cited by the prosecution are those where the narcotics have been found in the *possession of the defendant.*

In the cases decided by our Appellate Courts the residence and activity of the defendant within the

district has been shown. In all these cases the defendant resided and conducted the activities involved for a long period of time in the jurisdiction of the court. In all these cases it has been shown that the defendants were *possessed* of the narcotics within the district when arrested. In all of these cases it has appeared that the defendant purchased the narcotics. On such a set of facts it is very logical that the place of purchase may be proved by inference to be within the district. Facts make the law, and the facts shown in these cases without the help of any presumption, are sufficient to prove venue. *U. S. v. Karavias,* 170 F. (2d) 968, quoted by the prosecution, is to the effect that it is sufficient if venue can be concluded from the evidence as a whole to be at the place alleged in the indictment. The same rule is enunciated by the Supreme Court in *Casey v. U. S.,* 72 L. Ed. 632. The claim by the prosecution that there is a presumption of venue is a misstatement of this case. The *Casey* case simply holds, as it so succinctly states at page 418:

> "But we are of opinion that upon the *facts of this case* the court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug, but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle is strong, * * *" (Italics ours.)

The *Casey* case does not agree with the arguments of the prosecution that there is a presumption of venue. The Supreme Court of the United States says:

> "But we are of opinion that upon the *facts of this case* the court was right."

The prosecution puts great weight on the decisions in *Mullaney v. U. S.*, 82 F. (2d) 638, and *Acuna v. U. S.*, 74 F. (2d) 359. In these cases the facts showed venue where the charge was brought.

In the *Acuna* case his long residence in El Paso, Texas and days of activity by him in connection with the narcotics involved in El Paso, Texas were shown. These *facts* clearly showed the venue in El Paso, Texas.

In the *Mullaney* case the defendants sold narcotics in the house where they lived, and the narcotics were found in the same house. The marked money involved was found in one of defendant's beds in the same house. It is the *facts* which fix venue.

It is a prime question whether Judge Haney in writing the Mullaney decision correctly interpreted the decision of the Supreme Court in *Casey v. U. S.* Judge Haney's statement that the opinion of the Circuit Court of Appeals in *Casey v. U. S.* was approved by the Supreme Court is incorrect. A close reading of the opinion of the Supreme Court will show that *the opinion is based solely upon the facts as found in that case.* The opinion of the Circuit Court was written without reference to the facts. The Supreme Court didn't base its decision in the *Casey* case on expediency as was done in the Circuit Court of Appeals. We reiterate, it is the facts which make the law.

Furthermore, the Supreme Court in the *Casey* case does not disapprove the decision in *Brightman v.*

U. S., 7 Fed. (2d) 532. *Every case on this point must stand on its own facts.*

The prosecution's interpretation of the evidence is that Stoppelli had possession of one envelope, but the locale of that possession is not shown. In all the reported cases the person was apprehended with the narcotics *in his possession,* so there was little, if any, argument as to venue.

We respectfully urge that the Ninth Circuit Court of Appeals realign the decision in the *Mullaney* case to be upon the facts thereof in accordance with the clear meaning of the decision of the Supreme Court in the *Casey* case.

The prosecution misstates the contentions of appellant (pp. 40-41) when it uses quotations from *U. S. v. Jones* as being contrary to our contentions. We do not contend that venue must be proved by direct evidence. To make such a contention would be to destroy the rules of evidence and proof. Venue may be proved by circumstantial evidence, but circumstantial evidence proving venue must be as strong as circumstantial evidence to prove any other fact in a criminal case. In other words, the circumstantial evidence showing venue in the Northern District of California must be clear, convincing and establish such venue to a moral certainty and beyond a reasonable doubt.

The prosecution throughout its brief constantly refers to rules of aiding and abetting and conspiracy in support of the conviction in this case. This forgets

the fact that the conspiracy has been removed from the picture as far as this appeal is concerned.

The prosecution quotes from *Ford v. U. S.* (p. 42) seemingly contending that quotation is authority in this case. The quotation is no authority herein because it refers to a set of facts where one does an act with the intent it shall take effect in another state. There is no evidence here that Stoppelli did anything at any place, which was to take effect in California..

The prosecution's quotation from *Palmero v. U. S.* (pp. 42 and 43) is misleading because it has not told this court that that was a conspiracy case. The facts in that case are that four men were in a conspiracy to bring opium from Marseilles, France to New York. Two men who were transporting it on a ship were arrested as the ship docked at Boston. Clearly an act was committed by two of the conspirators in Boston, to-wit, possession on board a ship in the course of transporting.

The prosecution (p. 46) gives the hypothetical case of the finding of a dead body in California with a gun near it belonging to a man living in New York. No one as an independent contractor would buy a dead body and a gun in New York and transport it to California, but a person as an independent contractor would buy narcotics and take them to California for his own use. Furthermore, narcotics can pass from one independent contractor to another, many times, which heightens the dissimilarity. Even more glaring is the failure of the prosecution to say where the venue

for the prosecution for murder would be. Would it be in California without proving where the murder was committed?

The prosecution quotes at length from the case of *People v. Frank Jones,* 12 N.Y.S. (2d) 635 where the defendant was convicted of safe blowing on the evidence of his fingerprint upon the safe. The prosecution forgets that in that case evidence was introduced showing that the print of the defendant could not have been innocently placed upon the safe. Here, Stoppelli's print could have been placed upon the envelope when it was empty. Furthermore, Stoppelli's print could have been placed upon the envelope when it had heroin in it, but if he did not know it contained heroin, he would not be guilty of a crime. This is clearly established in that portion of the opinion quoted by the prosecution where, referring to the fingerprint, it is said

> "was found under such circumstances that it could only have been impressed at the time when the crime was committed."

The prosecution argues the holding in *U. S. v. Bruno,* 105 Fed. (2d) 921, sets up a doctrine of resultant criminal responsibility. The *Bruno* case held there was a conspiracy and the conviction was affirmed on the basis of a conspiracy. We repeat that the trial court held there was insufficient evidence of a conspiracy so the *Bruno* case can have no application to the case at bar.

The intensity with which the prosecution presented its case to the jury showed an unparalleled eagerness to get a conviction by any means. The prosecution is guilty of the same conduct in this court when it refers to the case of *U. S. v. Perillo* and tells this court that Stoppelli was involved in that case. The only purpose of the prosecution in so informing this court is another deliberate attempt to prejudice this court against Stoppelli, even as was done by Greene.

CONCLUSION.

The prosecution argues the evils of the narcotic traffic as a ground for affirming the conviction.

We respectfully submit that more important than abolishing the narcotic traffic are the fundamental principles of American law, to-wit: an honest abiding by the rules under which a man is deprived of his liberty.

The scrap or shred of Stoppelli's fingerprint standing alone unconnected with any other circumstances proving his guilt, is insufficient under our system of jurisprudence to sustain a conviction; it creates only a suspicion and is overcome by the presumption of innocence.

The prosecution's case was fatally defective; it being without sufficient proof of the crime and of the venue, when the indictment was returned. These defects were not remedied by proof at the trial.

This conviction comes to this court supported, neither by facts nor law.

Wherefore, it is respectfully submitted that the judgment of conviction should be reversed as to both counts.

Dated, San Francisco, California,
February 20, 1950.

Respectfully submitted,
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Attorney for Appellant.